HIGHWAY OF THE SEA.

LORD.

1862.

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IN TIME OF WAR.

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"In war, passion and hatred, and seeming necessity and the fancied interest of the moment, are apt to determine the actions of combatants; and powerful belligerents, relying on their might, oftentimes set at defiance the best-established rules of war."—*Sir W. Molesworth's Speech in the House of Commons, July 4th*, 1854.

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PREFACE.

SINCE the following pages were written, intelligence has arrived in this country of the tardy surrender of Messrs. Mason and Slidell. This act of the Government of the Federal States takes away all necessity for immediate action, or even for immediate deliberation on the part of Great Britain. It is, however, not improbable that persons on both sides of the Atlantic may be found ready to see in this event an instance rather of the tyranny of overbearing force than of the triumph of the unalterable principles of Law and Justice. It becomes, therefore, all the more important —and this especially, when, by the light of the official correspondence on the subject, and of the comments which have since appeared in the public journals of the Federal States, we contemplate the possibility of future complications arising which may involve many of the same points under circumstances more favour-

able to the suppression of neutral rights—to have it clearly shown that in respect, as well of the general principle of the right of seizure, as of the mode in which that right was in this particular case exercised, the act of Captain Wilkes has been from first to last an unwarrantable violation of that independence of non-belligerent vessels, which in the interest of neutral nations, no less than in vindication of her own honour, Great Britain was morally bound to assert and to maintain by those means, which the Law of Nations sanctions when the principles of that law have been set deliberately at defiance.

HENRY W. LORD.

1, Tanfield Court, Temple,
January 10*th*, 1862.

THE HIGHWAY OF THE SEAS.

It is in the nature of things that questions of International Law can seldom or never be, at the same time, publicly and temperately discussed. The judgment of a nation is as liable as that of individuals to be warped by prejudice, or seduced by self-interest, or distracted by passion—is, indeed, more so, inasmuch as, when matters, which call for a people's judgment, are stirring, any questioning of motives is assumed to involve a lukewarm patriotism, and doubt appears disloyalty ill disguised. So comes it that, in times of popular excitement, difficulties, which practical experience and theoretic speculation have equally failed to overcome, are readily solved, or more readily disregarded, by impetuous ignorance or wilful misrepresentation; and the mind, deliberately impatient of argument, becomes unconsciously impatient of justice.

How far soever these remarks may be appropriate to the state of feeling which, if the reports and articles in public journals afford any fair criterion of national sentiment, does certainly prevail at the present time upon the further side of the Atlantic, the manner, in which, ever since the first ebullition of a perhaps hasty, but still a pardonable indignation subsided, this unfortunate complication of our relations with the Federal States of North America, has been generally discussed in England, at least justifies me in thinking that there are very many among us who are ready to welcome any attempt to collect and give consistency to the various principles and theories affecting that portion of international law which bears upon the case of the *Trent;* to sift and scrutinize the instances in past history which are alleged to be specially applicable to the points in dispute, and by such means as dispassionately as we can, having at heart the interest and the honour of our country, to ascertain whether the people of the Federal States have been too hasty in justifying, or we too hasty in condemning, the conduct of the commander of the *San Jacinto.* This attempt I now propose to make, and I will proceed at once to give a short statement of the facts of the case, so far as they are material to the end at which I aim,

omitting all mere matter of aggravation, and premising that, as no official papers have as yet been made public, and I derive my account exclusively from the various organs of the press, I shall not take as granted any part of the details essential for my purpose that is at all likely to be disputed.

Statement of the facts of the case.

On the 7th of November, 1861, the *Trent*, a steam-packet, carrying her Majesty's mails in the charge of an officer in her Majesty's service, sailed, according to previous advertisement, on one of the periodic voyages as an ordinary mail steamer from the Havannah, a Spanish settlement, to the island of St. Thomas, which is an appanage of the Danish Crown, with the purpose of meeting at the latter place, in the ordinary course of transit, the West India Mail steamer bound for Southampton.

On board the *Trent* were Messrs. Mason and Slidell, each accompanied by some members of his family, and a private secretary; for all these persons the usual fare had been paid, and their berths secured beforehand as ordinary passengers to England. These two gentlemen were known to hold a position of considerable influence and trust as members of the States seceding from the American Union; they had run the blockade from Charlestown to the Havannah, and were supposed to be in the possession of despatches, and charged

with an important mission, and probably were accredited Commissioners from the *de facto* Government of those seceding States to the Courts of the Tuilleries and St. James's respectively.

On the morning of the 8th November, the *Trent*, while, according to the report in the *Times* of November the 28th, in the narrow passage of the old Bahama Channel, was hailed and brought to by the *San Jacinto*, a ship of war in the service of the Federal States of America, and there was boarded by an officer of that vessel, who proceeded to remove Messrs. Mason and Slidell, and their secretaries, as prisoners of war, from the *Trent* to the *San Jacinto*, against the protest of the captain of the *Trent*, and the officer in charge of the mails, who stated that they yielded to superior force only; and after the persons removed had appealed to the British flag for protection. The *Trent* was then allowed to continue on her course without them.

Such are the facts. Upon the question, if any such arise, as to the neutrality of the waters in which the seizure took place, I do not propose to say anything; it has not, so far as I am aware, been raised in the controversy, and as it would obviously, if it could be raised, afford so easy and so speedy a solution of the whole

matter, it may be fairly assumed that it does not arise at all.

Limits of "Right of Visitation and Search."

Before, however, endeavouring to ascertain the rules of international law applicable to this state of facts, it is important—and by nothing more than the turn which most discussions upon this subject have hitherto generally taken, is that importance made manifest—to start with the assertion of that which, though never, indeed, denied, has been continually lost sight of, namely, that the lawfulness of the seizure of these persons depends entirely upon the limits within which the Right of Visitation and Search may be properly exercised. There are distinguished writers on international law (and of all living the one perhaps the most distinguished, M. Hautefeuille, is among them), who maintain that the right of search as distinguished from that of visitation is altogether unjustifiable, and who limit the belligerent right to that of being satisfied, by the inspection of the official papers of the neutral vessel, that the latter is of the nation whose flag it bears; and, in the sole case of its destination being a hostile port, that the privilege of its neutrality has not been forfeited by the conveyance of contraband cargo, or the design to commit a breach of blockade: this theory, how-

Hautefeuille's limitation.

ever, is certainly one which is not so generally adopted, as to be entitled to rank among the universally acknowledged principles of the Law of Nations; and the right of search, even when the papers are in every particular genuine and satisfactory, must be admitted to exist in practice and to be sanctioned by prevailing usage. But there are limits, beyond which the most strenuous advocate of the belligerent right of search has never ventured to claim for it an extension. Search may be made for enemy's property; for articles contraband of war; or for men in the land and naval service of the enemy. Throughout the great dispute between Great Britain and the United States, upon the alleged right of the former to impress seamen on board American merchant ships (of the analogy to which in the present case so much has been so groundlessly asserted,) the contention was confined exclusively to the attempt to show that the right, which Great Britain maintained, of reclaiming those who owed allegiance to her as subjects, wheresoever found, was a necessary incident to the right of search as such. This the United States denied; but in no instance was it ever suggested by either party that *enemy's* subjects, other than

Claim of right of impressment as incidental to right of search.

those actually engaged in their land or naval service, could possibly come within the limits of that right.

The truth of this statement an examination of contemporaneous documents will abundantly establish.

During nearly the whole of the French revolutionary war, Great Britain asserted and exercised a right of searching private vessels, belonging to subjects of neutral states, for the purpose of reclaiming deserters and other persons liable to be impressed into her naval or military service: this claim was from the first strenuously resisted by the United States, and was ultimately the cause of the war between those countries in 1812, in which, as Mr. Lawrence, the learned editor of Dr. Wheaton's "Elements of International Law," has observed,* all the claims of the latter against the former were merged: since that time, to use the words of the same writer, "The disregard by England and France of all international rights, from the rupture consequent on the peace of Amiens to the end of the general European war in 1815, by order and decrees professedly retaliatory of each other, and which sacrificed all neutral powers to their conflicting belligerent pretensions, have been disavowed

* Wheat. Int. Law, 6th ed. p. 537, n.

by both as constituting precedents for the future conduct of nations." This acknowledgment of itself suggests one answer, were the cases in other respects at all parallel; but it is most manifest that the claim of Great Britain, whether justifiable or not, was founded solely upon the allegiance owed by the subject as such to the crown, and upon the consequent obligation to render military service when required. That this is so, appears throughout the history both of the disputes which terminated in the war of 1812, and of the subsequent negotiations between Mr. Rush, Mr. Gallatin, and other representatives of the United States, and the British ministers, with the view of getting rid of that cause of complaint. The Prince Regent, in his declaration of 1812, uses the following language:* "His Royal Highness can never admit that in the exercise of the undoubted, and hitherto undisputed right of searching neutral merchant vessels in time of war, the impressment of British seamen, when found therein, can be deemed any violation of a neutral flag; neither can he admit that the taking such seamen from on board such vessels can be considered by any neutral state as a hostile measure, or a justifiable cause of war. There is no right

Prince Regent's Declaration, 1812.

* Annual Register, 1813, p. 2.

more clearly established than the right which a sovereign has to the allegiance of his subjects, more especially in a time of war."

Mr. Rush, the American Envoy Extraordinary at the Court of London from 1817 to 1825, in a conversation with Lord Castlereagh, to which I shall have to refer again for another purpose, seeks to confine the right within bounds more narrow than those which I have conceded. "The United States,"* he says, "never denied to Great Britain the right of search. They allege, however, that this means search for enemy's property or articles contraband of war, not search for men."

Mr. Rush, American Envoy, on right of search.

In a subsequent passage, however, relating another interview with Lord Castlereagh, he adopts the more accurate limitation.

"He remarked† that we gave our ships a character of inviolability that Great Britain did not; that we considered them as a part of our soil, clothing them with like immunities. I said that we did consider them as thus inviolable, so far as to afford protection to our seamen, but that we had never sought to exempt them from search for rightful purposes—namely, for enemy's property, articles

* Residence at the Court of London, p. 160. † *Id.* 253.

contraband of war, or men in the land or naval service of the enemy. This constituted the utmost limit of the belligerent claim as we understood the law of nations."

President Madison's Message, 1813.

To these quotations I will add but one other, derived from a source which gives it an especial force on such a question. President Madison, in his message for the year 1813, uses the following words:*—

"The British Cabinet must also be sensible that with respect to the important question of impressment, a search for or seizure of British persons or property on board neutral vessels on the high seas, is not a belligerent right derived from the law of nations, and it is obvious that no visit, or search, or use of force for any purpose on board the vessel of one independent power on the high seas, can in war or peace be sanctioned by the laws or authority of another power."

I have been thus particular in citing these authorities upon a point which might appear beyond all doubt, because they are equally valuable for another purpose. They do indeed show that it was as subjects, and subjects only, that Great Britain sought to seize men on board of American vessels; but more than this, they show

* Ann. Reg. 1813, p. 406.

that then, and from the first, the United States persistently refused to recognise any right in a belligerent to search for its own subjects on a neutral vessel.

The principle upon which the exercise of this right was claimed, as incidental to the right of search, may not at first be clear. There occurs, however, in a work to which I have already had occasion to refer upon another point, a passage which furnishes the true explanation of the grounds, on which this claim was based.

Mr. Rush devotes several pages of his "Residence at the Court of London" to a "general account" of the question of impressment, the settlement of which was one of the most prominent of the subjects which were entrusted to him in the negotiations then pending between the United States and Great Britain.

The case made by the latter Power he puts thus:* "She complains that she is aggrieved by the number of her seamen who get into the merchant service of the United States, through our navigation laws, and other causes. *This takes from her, she alleges, the right arm of her defence.* Without her navy, her existence, no less than her glory, might be endangered. It is, therefore, vital

to both, that *when war comes*, she should reclaim her seamen from the vessels of a nation where they are so frequently found." The British Government then appears to have reasoned thus; the right of search depends on the principle, that a neutral may not do that which results in a benefit to one belligerent at the expense of the other: Great Britain has by her own laws the right in time of war to obtain, by impressment, the services of her native merchant seamen on board of her men of war: the employment of them on board of neutral merchant ships is such a benefit to the enemy, by depriving her, their mother country, of those services, as to justify her under the belligerent right of search in reclaiming them as her subjects to their allegiance. The value of that reasoning need not be here considered; but it does explain what might seem obscure, and at once takes from the instances of impressment even the appearance of an analogy to the present case.

The main questions.

Thus much by way of clearing the ground: the main questions, those upon the answers to which the whole difficulty hinges, are the three following.

1st. What was the character of the vessel from which these persons were removed?

2nd. What was the character of the persons who were so removed?

3rd. Are the characters filled by those persons, and the vessel respectively, such as justify the seizure by the *San Jacinto*, according to the received principles of international law?

Character of the *Trent*.

Upon the answers to the first of these questions there is now little or no doubt entertained in any quarter. The *Trent* was a neutral vessel sailing between neutral ports: there is no suggestion, and there could not be room for any, of fictitious papers, or of colourable destination (as in the case of the *Orozembo*);* at the time of the seizure, that vessel was engaged in the regular postal service, carrying the mails to join at *S. Thomas'* the homeward-bound mail steamer. Whether this is such a duty as, upon general principles of international law, should give to the vessel which performs it any privileges of exemption from visitation and search similar, if not analogous, to that universally accorded to neutral ships of war, is a question which I propose to consider under the third of the above heads; on the other hand, I wish at once to repudiate any idea of claiming that or any such privilege as derived from the fact of her Majesty's mails so called, being on board the vessel, and

* 6 Rob. Rep. 430.

under the charge of the admiralty agent, an officer in her Majesty's navy; the fact is not without its value, as showing that all was being done in the due and regular performance of an ordinary employment with perfect *bona fides*, without fraud or concealment; but I cannot for one moment grant that a vessel the property of private individuals, as this was, and used by them for purely commercial purposes, could acquire, by contracting with Government to convey at stated times a few mail bags and the person in charge of them, the rights and exemptions enjoyed by ships of war and other vessels, the property of the State, or employed for the time exclusively upon State purposes, any more than I can conceive that a Queen's messenger in travelling on a State errand, by his mere presence as a passenger on board a mail packet, would impart to that packet a character exempting it from the jurisdiction of a foreign port, in which it might be coaling, or repairing, or otherwise temporarily delayed.

Argument in *Caroline* as to non-obligation of "private merchants" to carry, distinguished.

The character of the vessel then is ascertained to be that of a neutral packet, sailing periodically between neutral ports under contract with Government for the postal service; this character of itself answers an argument in favour of a right to *seize*, founded on the following passage

from the judgment in the *Caroline.** "It has been argued truly," says Sir William Scott, "that whatever the necessities of the negotiation may be, a private merchant is under no obligation to be the carrier of the enemy's despatches to his own Government. Certainly he is not, and one inconvenience to which he may be held fairly subject is, that of having his vessel brought in for examination, and of the necessary detention and expense. He gives the captors an undeniable right to *intercept* and examine the nature and contents of the papers which he is carrying; for they may be papers of an injurious tendency, although not such on any *à priori* presumption as to subject the party who carries them to the penalty of confiscation; and by giving the captors the right of that inquiry he must submit to all the inconveniences that may attend it." It is said that a right to seize despatches, though the vessel be not confiscated, is here distinctly recognised; but in the first place, "intercept" is by no means equivalent to "appropriate," and when followed by the words, "and examined," obviously must mean "detained on the passage," for the purpose, namely, of examination, and no more: and next, the answer, of which I have

* 6 Rob. Rep. 469.

spoken, is contained in the fact that the *Trent*, as a public mail packet, was under the very obligation under which the private merchant was not.

Character of persons seized.

Now, with reference to the character of the persons, there appears in the outset an obstacle, the cause of which has, to my mind, been far too lightly treated. The act of the officers of the *San Jacinto* in removing the persons of Messrs. Mason and Slidell from the *Trent*, leaving that vessel to pursue her voyage unmolested by further interruption, has been by many regarded as a mere neglect of due formality, an irregular proceeding which may be waived if the substance of the complaint be subsequently established—some have been at pains to express a lofty pity for those who are ready to rely upon a so called technical objection, founded on the non-fulfilment of strict legal requirements in an unessential preliminary; and American writers have gone so far as to claim credit for considerate leniency and courteousness in not taking the whole vessel into port for condemnation. What might have been the result of such a course is a speculation in which it would be unprofitable to indulge; one obvious result of the neglect to follow the rules, which the comity of nations has approved as requisite to the due exercise of a right, trenching

Removal more than informal.

so seriously upon the independence of neutral powers, is that the very fact of these gentlemen being in any sense charged with the performance of a public service, except so far as their own admission is said to have gone, rests upon the insecure foundation of general report; and whether they be duly accredited commissioners, or simply private agents invested with a quasi-diplomatic character, is a matter which is, even at this period, not properly ascertained. But a more serious consequence than this, and one which goes to the root of the whole transaction, I prefer to notice in the words of one who little anticipated when he used them, how forcibly in half a century they would still be found to apply between the same parties with this difference, that the parties had exchanged positions.

Mr. Rush, the American envoy, whose language I have before had occasion to adopt, while urging strongly upon Lord Castlereagh the injustice of the system of impressment then exercised by British men-of-war upon sailors on board of American merchant ships, put the case thus:—*

"A British frigate in time of war, meets an American merchant vessel at sea, boards her, and under terror of her guns, takes out one of her

* Residence at Court of London, p. 158.

crew. The boarding lieutenant asserts, and let it be admitted, believes the man to be a Briton. By this proceeding, the rules, observed in deciding upon any other fact when individuals or national rights are at stake, are overlooked. The lieutenant is accuser and judge. He decides upon his view instantly. The impressed man is forced into the frigate's boat and the case ends. No appeal follows. There is no trial of any kind. More important still, there is no remedy, should it appear that a wrong has been committed. Different is the mode of proceeding if an American merchant vessel be stopped and examined at sea under circumstances subjecting her to suspicion as prize of war. In the latter case, the boarding officer sends the vessel into port under accusation. Facts are inquired into judicially. Both parties are heard. Both have ample opportunities of bringing forward proofs. Should the tribunal decide that no lawful cause of seizure existed, the vessel is restored, the captors are answerable in damages, and there are adequate modes of making them pay. If, on the other hand, the *man* seized be in fact no Briton, the most he can ever hope for is to be released. . . . Should the order for his discharge be obtained, where is his action for damages? where is his remedy for loss of liberty? He has none."

No comment, no attempt at illustration on my part is needed to show how wholly within the principles of these words lies the self-constituted tribunal in the present case.

Surely, then, it is no unimportant omission of a mere formality, the consequences of which have so marked a resemblance to those which are treated as proofs of an unjustifiable oppression.

The uncertainty in which this matter is thus left compels me to consider the character of these persons from two points of view; as having, or not having, any special privileges and protection, which might appertain to them as ambassadors or envoys; but which would not do so, did they rather hold the semi-official position of secret emissaries; first, however, should be ascertained the grounds upon which, whether they be accredited commissioners or not, the Federal States claim in any event to make themselves masters of their persons.

Claim of right to seize persons threefold.

This they appear to do in three ways:—

1. As subjects.
2. As contraband of war.
3. As enemies simply.

I am not, indeed, aware of any distinct claim having been put forward which recognises the different nature of the right asserted in the second

and in the third case; it will, however, simplify th investigation if this division be adopted.

As subjects.

1. The claim to seize these gentlemen as subjects depends on a twofold consideration; first, are they subjects liable to be taken by a belligerent from a neutral vessel, assuming such a belligerent right to exist? and second, does such a right exist?

Put in this form, the claim is on the face of it reduced to a dilemma; for, as there is no doubt that it is only by virtue of a state of belligerency, so to speak, existing, that any such right, be it of visitation and search, or, as England claimed before the war of 1812, of impressment, is claimed at all, and as the essential element for a state of belligerency is expressed by the homely saying, "it takes two to make a quarrel," it follows that, the Southern States being at this time the only people with which the Northern States had any quarrel, members of the Southern States are either subjects, and if so, not belligerents, in which case no belligerency, and therefore no right even of visitation, exists, or they are not subjects, and then *cadit quæstio.*

Rebels are belligerents.

But, indeed, as to the right of neutral nations to treat provinces in the position of these Southern States, whether they be called rebelling or seceding, as belligerents to the same extent as if

they were independent nations, there is not the shadow of a doubt. Dr. Wheaton, the weight of whose opinion the States of North America would naturally be the last to undervalue, expressly lays it down, in a passage, the marginal note to which runs thus, "Parties to civil war entitled to rights of war against each other," that "If the foreign State professes neutrality, it is bound to allow impartially to both belligerent parties the free exercise of those rights which war gives to public enemies against each other: such as the right of blockade and of capturing contraband and enemy's property. But the exercise of those rights on the part of the revolting colony or province against the metropolitan country, may be modified by the obligation of treaties previously existing between that country and foreign states." * And in his reports of cases decided in the Supreme Court, the same principle is continually recognised.† And not only so, but in times very recent, a readiness to adopt this principle has been evinced by the Government of the United States itself, to a degree which elicited grave remonstrance on the part of one European State, and was not imitated

Readiness of United States to recognise Hungarian rebels.

* Wheaton's Int. Law, p. 32.

† United States *v.* Palmer, Wheat. Rep. 3, 610. The Divine Pastora, *Id.* 21, 63. The Nicestra Signora de la Caridad, *Id.* 502.

by any other. In the year 1849, the people of Hungary, under Kossuth, had offered certainly not more resistance to the Emperor of Austria than the Seceding States have done to the Federal States, yet the then Government of the United States thought it consistent with the strictest neutrality to authorize an agent to declare their willingness to recognise the new State, in the event of its ability to sustain itself; and a prominent place in the President's message, and a lengthened correspondence with the Austrian Minister, were deemed not unworthily bestowed upon the subject of their justification.*

Argument from acts of Great Britain.

Before leaving this part of the matter, I feel bound to notice one form of defence in the nature of that which lawyers technically term an *estoppel*, which, although promiscuously applied to all parts of this case in a manner which speaks more for honesty of purpose than for clearness of judgment in those of our own country who have used it, applies, if at all, only to this part which I am now considering. It has been continually urged that, right or wrong, Great Britain may not complain of the act of the *San Jacinto*, for she has been notoriously delinquent in the very same circumstances.

* Webster's Works, vi. p. 488–506. See Wheat. Int. Law, 6th edit. by Lawrence, p. 36, *n. a.*

It is no part of my present purpose to question the moral of this reasoning; were I to do so, I should find the language of an American judge in a case of great importance* more impressive and more appropriate than any I could use of my own; but, inasmuch as the objection seems to appeal to our sense of honour and fairness, I prefer to deal at once with the assertions upon which the argument is founded, and to deny the existence of one single instance of alleged aggressions on the part of Great Britain at all parallel in its circumstances to the present one. Of the cases specially cited to prove this charge, those of Laurens, the deputed Minister to Holland from the United States, of Lucien Buonaparte, and of the two nephews of Washington, the first has been conclusively disposed of by the proof that the *Mercury*, on board of which Mr. Laurens was found, was not a neutral but a belligerent.† The applica-

Case of Laurens.

* The Nereide, 9 Cranch Rep. p. 388. "There is a principle of reciprocity known to courts administering international law, but I trust it is a reciprocity of benevolence, and that the angry passions which produce revenge and retaliation will never exert their influence on the administration of justice. Dismal would be the state of the world, and melancholy the office of a judge, if all the evils which the perfidy and injustice of power inflict on individual man, were to be reflected from the tribunals which profess peace and good will towards all mankind."

† Holmes's Annals of America, 2, 319. Belsham's Hist. Gt. Britain, 7, 53. Adolph. Hist. Eng. 3, 221.

bility of the second upon any ground I have not yet been able to discover. Lucien Buonaparte embarked at Leghorn on board an American vessel, to sail to Cagliari. On his arrival at that place he demanded of the British resident Minister protection and permission to proceed unmolested to America. The second portion of this demand our Minister was unauthorised to accede to, and consequently desired him to proceed under convoy to Malta and wait for further orders, which when they came were for his transfer to Great Britain.* Throughout the whole transaction he appears to have been a consenting party, if not positively desirous of being taken to England.

Case of Lucien Buonaparte.

These two cases should properly have been discussed under the third head, they being cases of claim to seize the persons of enemies simply, if at all in point; but as they, equally with the third case which I have noticed (that of the nephews of Washington), and which is acknowledged to have been a mere mistake,† have been treated as parallel instances, though having, except in the last case—one of impressment—not even the semblance of a grievance; I thought it better to clear

* Annual Reg. 1810, p. 264.

† Manning's Com. 375. Jefferson's Mem. iv. 190–5.

the way of them also before entering on the real matter in dispute.

As contraband of war.

But it is said these persons were liable to be seized on board of a neutral vessel as contraband of war. Here, again, we are met by the obstacle to which I before alluded—the absence of materials for forming a correct opinion upon the real nature of their mission and authority. Assuming, however, that they are shown either to be invested with the character of accredited commissioners, or envoys, which may be taken to be equivalent to that of ambassadors, or to be "persons sent out on the public service at the public expense," it still remains to be considered whether, upon either supposition, they were, under the circumstances of the case, contraband within the meaning of that term as applied to persons by writers on international law: I say as applied to persons, for it must be remembered that, in strictness, contraband is a term limited to articles, such as munitions of war in all, and other merchandise in some, cases, the property of neutral owners, being conveyed to belligerents on neutral vessels; such articles the other belligerent is allowed to seize, upon the principle that the furnishing them to an enemy is, in effect, to afford him direct assistance in maintaining the war, to the detriment of his adversary.

An Ambassador contraband.

The act, however, of conveying persons in high station and trust among the enemy, if it be not justifiable on the general principles of international law, is a far more serious violation of that law than the mere conveyance of a few tons of saltpetre or a few stands of arms; and this is recognised by the difference of the penalty enforced on the neutral, which in the former case extends only to the confiscation of the contraband articles, but in the other case embraces the ship as well.

Stopping an Ambassador on his passage.

Now so far as the privilege of ambassadors is concerned, I have little doubt that no one would have dreamed of calling it into question, but for an unfortunate phrase in the judgment of Sir William Scott, in the case of the *Caroline*. The peculiar sacredness of the persons of ambassadors, the extraordinary protection and immunities which they enjoy, and the immense importance to the interest of the world that this should be so, are too familiar to the most superficial student of the law of nations to admit of a doubt that, on general principles, if any subject of one belligerent state can, under any circumstances, be privileged from capture by the other, one who is proceeding on board a neutral vessel to fulfil the duties of ambassador in a neutral country, is secure. What, then, is the meaning of this remark of the distin-

guished judge whom I have mentioned: "You may stop the ambassador of your enemy on his passage?" The whole paragraph is as follows:—

"I have before said, that persons discharging the functions of Embassadors are, in a peculiar manner, objects of the protection and favour of the law of nations. The limits that are assigned to the operations of law against them, by Vattel, and other writers upon those subjects, are, that you may exercise your right of war against them wherever the character of hostility exists; you may stop the Embassador of your enemy on his passage, but when he has arrived, and has taken upon himself the functions of his office, and has been admitted in his representative character, he becomes a sort of middle man, entitled to peculiar privileges, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are, in some degree, interested. It has been argued, that he retains his national character unmixed, and that even his residence is considered as a residence in his own country; but that is a fiction of law invented for his further protection only, and as such a fiction, it is not to be extended beyond the reasoning on which it depends. It was intended as a privilege; and I am not aware of any instance in which it has been urged to his

disadvantage. Could it be said that he would, on that principle, be subject to any of the rights of war in a neutral territory? Certainly not; he is there for the purpose of carrying on the communications of peace and amity; for the interest of his own country primarily, but, at the same time, for the furtherance and protection of the interests which the neutral country also has in the continuance of those relations."*

In the first place be it observed that this assertion is in no way necessary for the decision of the point in the case, which was the lawfulness of conveying despatches on board a neutral vessel from an ambassador of a belligerent in a neutral state to the belligerent country, but merely by way of illustrating the general proposition which immediately precedes and must be taken to qualify it. "You may exercise your right of war against them (ambassadors) wherever the character of hostility exists." This is a very essential limitation, the existence of a character of hostility, and a neutral mail-packet sailing between neutral ports does not, one would think, afford a state of things conducive to the development of such a character.

Vattel cited.

But secondly, the learned judge does not profess

* 6 Rob. Rep. 467, 8.

to originate this principle, but merely to adopt and apply the opinions of Vattel, whom he expressly mentions, and of other publicists. Now on reference to the only passage of that writer which at all bears out the statement cited, the whole difficulty is cleared away. He writes:—"On peut encore attaquer et arrêter ses gens, partout où on a la liberté d'exercer des actes d'hostilité. Non seulement donc on peut justement refuser le passage aux ministres qu'un ennemi envoie à d'autres souverains: on les arrête même s'ils entreprennent de passer secrètement et sans permission dans les lieux dont on est maître;" * and then, by way of illustration, follows the well-known case of the Maréchal de Belle Isle, who on his road as ambassador from Paris to Berlin was arrested in a village of Hanover, the sovereign of which, being also King of England, was then at war with France; so that at the time of his arrest he was actually within the enemy's territory, and therefore the character of hostility existed; or, in Vattel's own words: "He was in that position where the enemy had a right to use hostile measures against him." Moreover it must be observed that the entire bearing of the subsequent remarks is to anticipate in favour of the ambassador an objection

* Vattel, Droits des gens, iv. 7, 85.

which might be taken on the ground of this extra territorial privilege in respect of his relation, not with the belligerent, but with the neutral power within the limits of whose territorial jurisdiction he otherwise would necessarily be. The privileges which arise upon his arrival in the neutral country, and upon his assumption of the functions of his office, are purely immunities from the jurisdiction of that country, and it by no means follows, that because necessarily that immunity cannot arise until his arrival, therefore his "inchoate character" is not sufficient, at all events when actually on board a vessel of the country to which he is proceeding, to protect him from capture by a belligerent.

Absence of evidence to show official character.

If, however, Messrs. Slidell and Mason may not claim the protection accorded to ambassadors as such, what is there to show that they fall within the other category which I have mentioned, as persons sent out on the public service at the public expense? what is there to show that they are not travelling at their own expense, and possessed of no official character, but intending to act as private persons though on public affairs; much as was done by the numerous emissaries of the French Government during the revolutionary wars, whose private correspondence,* though often most

* See The Caroline, 6 Rob. Rep. 469.

detrimental to the public interests of this country, could never be distorted into the likeness of a public despatch, so as in any sense to assimilate contraband of war?

"The substance of the thing," says Sir W. Scott, in the case of the *Friendship*,* where the vessel was let out for the transport of mariners, belligerent subjects, "is whether they are vesssels hired by the agents of the Government for the purpose of conveying soldiers or stores in the service of the State. * * * It would be a very different case if a vessel appeared to be carrying only a few individual invalided soldiers or discharged seamen, taken on board by chance and at their own charge. * * * * It is asked, will you lay down a principle that may be carried to the length of preventing a military officer, in the service of the enemy, from finding his way home in a neutral vessel to Europe? If he was merely going as an ordinary passenger, as other passengers do, and at his own expense, the question would present itself in a very different form. Neither this court nor any other British tribunal had ever laid down the principle to that extent."

Are public officers liable to seizure.

Assuming, however, that these persons are shown to be "employed on the public service at the public

* 6 Rob. Rep. 420.

expense," are they, therefore, liable to arrest? The phrase I have adopted from the judgment of Sir W. Scott in the case of the *Orozembo*,* as the most comprehensive form in which, so far as I am aware, the principle contended for is enunciated. The whole passage is as follows:—

"In this instance the military persons are three, and there are besides two other persons who were going to be employed in civil capacities in the Government of Batavia. Whether the principle would apply to them alone I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated, but it appears to me, on principle, to be but reasonable that, whenever it is of sufficient importance to the enemy that such persons should be sent out on the public service, at the public expense, it should afford great ground of forfeiture against the vessel, that may be let out for a purpose so intimately connected with the hostile operations."

The whole gist of this is to be discovered in the last sentence, "a purpose so intimately connected with hostile operations." Of such a purpose what evidence is there? In the absence of that evidence, the remarks of the same learned judge in another case, that of the *Caroline*,† have so obvious an

Privilege, that of neutral country.

* 6 Rob. Rep. 434. † 6 Rob. Rep. 466–7.

application that the introduction of them requires no apology.

"The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake in any degree of the nature of hostility against you. The enemy may have his hostile projects to be attempted with the neutral State, but your reliance is on the integrity of that neutral State, that it will not favour nor participate in such designs, but, as far as its own councils and actions are concerned, will oppose them. And if there should be private reason to suppose that this confidence in the good faith of the neutral State has a doubtful foundation, that is matter for the caution of the Government, to be counteracted by just measures of preventive policy."

If such a purpose were shown, there would still remain the exemption which the peculiar nature of the vessel, and the character and termini of the voyage, afford, a matter on which I shall have something to say presently.

Analogy of despatches.

Before quitting this part of my subject, it is requisite to notice one mode of discussing it, the reasoning in which is concentrated in an epithet. These persons have been, with a boldness of imagery worthy of a more poetic theme, termed

"living despatches," and, a preliminary difficulty thus easily got rid of, the matter has been treated as one purely of despatches. Were this allowable, I still have no doubt that the exemption, to which I last alluded, would apply with even greater force to them. But the simple answer is that they are not despatches. The law of nations, equally with common sense, recognizes a valid distinction between documents, which lie open to the eye, conveying a meaning on the face of them, or at least decipherable when the key is acquired, and the mind of man, to which there is no key but itself; and will not, in a case like this, where the actual despatches, if any ever existed or still exist, at all events are not to be found with the captors of their bearers, sanction such an insult to that principle of justice, which is the essence of all law, as first to assume the contents of a document, and then to impute a knowledge of them for the purpose of founding on it a sentence of condemnation.

Despatch to neutral Government.

Beyond all this it must never be forgotten that we may assume these despatches, living and lifeless alike, to have been on their passage to a neutral power for the sole purpose of putting their Government in communication with that of the neutral State. Now the right of the neutral

State to maintain communication with the belligerents is unquestionable.* Suppose, then, the neutral State, for the purpose of receiving a communication from one of the belligerents, to have contracted with one of its own subjects, whose private vessel was, as it might of course be without any violation of neutrality, in a belligerent port, for the transmission by his vessel of such communication; is the position tenable that that vessel while on the high seas is liable to be seized and confiscated for carrying contraband of war, by reason of the other belligerent finding that despatch on board? Is it the more so, because the despatch is entrusted to a subject of the belligerent for special custody and safe delivery? To this it may be replied, "No; but the despatch and its bearer may be taken." But on what ground?—clearly not as contraband, for that, in the case of persons or despatches, involves necessarily confiscation of the whole ship,† and neither compulsion‡ nor ignorance § gives any excuse. It must then be on the ground that they are enemy's goods and enemy's subjects; and this brings me to the third ground which I before mentioned, for I apprehend that the case

* Atalanta, 6 Rob. 440; Caroline, 6 Rob. 466.
† Wheaton, Int. Law, 562. ‡ Carolina, 4 Rob. Rep. 256.
§ Orozembo, 6 Rob. Rep. 430.

of a mail-packet is certainly a stronger one in favour of the immunity of such a communication and its guardian, than that of a vessel under a special contract to perform one particular service.

As the persons enemie

Now although the principle of "free ships free goods" has at last been recognised by Great Britain under the Treaty of Paris, 1856, yet the United States, having refused to become parties to that, and not being bound by any other treaty with Great Britain to recognise that principle, are undoubtedly warranted in any dispute with that State in insisting upon what they have hitherto without exception striven to abolish—the belligerent's right to seize enemy's goods on board a neutral vessel. But waiving the question whether a despatch to a neutral power could by any possibility be brought within the meaning of the rule of international law, which makes *goods* of enemies—articles, that is, of an appreciable commercial value—liable to seizure, no amount of figures of speech can suffice to get rid of that radical distinction of things and persons which the rules of international law admit and adopt to its fullest extent, and I fear that the theory of the "embodiment of despatches," must be reserved by its gallant and ingenious author for further development in a Pythagorean millennium. The question is

thus reduced to the simple one of the right to seize individual subjects of the belligerent as such on board a neutral vessel; for if they be regarded as more than mere subjects, as subjects charged with some public *office*, they become at once assimilated to that class in the nature of contraband, to which I have, in my former remarks, endeavoured to show that they do not belong.

Territoriality of merchant ships.

It is obvious that at this point the whole question of what has been called the territoriality of neutral vessels is at once opened. For the arguments by which the principle, that the flag covers the goods, has been upheld as being in favour of unrestricted commercial enterprize, have at best but a modified application to the case of the persons of enemies: while it should seem at first sight to follow *à fortiori*, that if enemies' goods on neutral bottoms are liable to seizure, the persons of enemies: the transport of whom may occasion far more harm to the belligerent and far more benefit to his adversary, should be so likewise. That, however, this is not so, will, I believe, appear as well from a study of the theory, as from an investigation of the practice of the right of visitation and search, upon which alone any interference with a neutral vessel is founded.

Origin of right of search, aggression on neutral.

That it is a serious interference with the independence of the neutral there can be no doubt; that the right of such an interference, whether justifiable on grounds of expediency or necessity, or not, had its origin in the might of the belligerent, and its permanence in the weakness of the neutral, is to be expected and is historically the fact; the continual reappearance of armed neutralities, from time to time upon the stage of history, suffices to show how much of the rights of belligerents has sprung up from a succession of ineffectual protest, ineffectual resistance, and ineffectual acquiescence. And so it is that Dr. Wheaton,* after a very short paragraph upon the general principle of the belligerent's right to seize enemy's goods on neutral bottoms, proceeds, with something like a sensation of relief, to observe that, however that may be, usage and custom have settled that right beyond dispute. To that statement I give an unqualified assent; but I say that usage and custom have not sanctioned the seizure of individual subjects of a belligerent; that what they have sanctioned is the treating the conveyance of any portion of the military or naval forces of the enemy in and for his actual service, as a direct act of par-

* Int. Law, 504.

ticipation in hostility, and, because such, as contraband, and entailing as a necessary consequence the confiscation of the vessel and cargo; and that the true explanation of this is to be derived from the consideration that the seizure, as well of goods as of men on board a neutral vessel, is in its inception a violation of neutral territory in its strictest sense; that such violation has in the case of goods grown into a right, because it has been necessarily of far more frequent occurrence—is in effect, if I may borrow an illustration from another branch of law, in the nature of an easement—a lawful interference, that is, with the full enjoyment by another of that which is his own property; in no way altering the quality of that property, though affecting the measure of its value.

Treaties submitting neutral ships to search.

It must never be forgotten that the exercise of this right is limited in three ways; * the vessel searched must be a neutral private ship; the vessel searching, a lawfully commissioned cruiser; the place of search, the high seas: and it has been well observed† that the treaties, and they are many, which expressly submit neutral merchant ships to search, do not expressly exclude neutral ships of war.

* Wheaton, Int. Law, 589. The Maria, 1 Rob. 340.

† Hautefeuille, Droits des Nations Neutres, 3, 466.

This shows two things: one, that the search of neutral merchant ships was considered fit subject to be secured by special stipulation between the contracting parties; the other, that it was deemed needless to exempt ships of war, inasmuch as no claim of right to search them had ever been as a principle set up: whence it appears, not that ships of war were exempt by a sort of courtesy to the neutral sovereign; but that merchant ships were made liable by a species of encroachment on neutral rights. It is clear also that in order to justify search, certain conditions of place and character must co-exist; such limitations all tend to show that there is some absolute and positive privilege or status which is a quality of the vessel searched; and which the co-existence of the required conditions at most suspends, but does not destroy. What is this but the territoriality to which I have above referred? It is admitted that a private merchant ship is neutral territory for all purposes of the municipal law of the State to which it belongs. "Every merchant vessel," says Wheaton,* "on those (the high seas) was rightfully considered as part of the territory to which it belonged. The entry, therefore, into such vessel by a belligerent power, was an act of force, and

Neutral ship neutral territory for municipal purposes.

* Wheaton, Int. Law, 162, cf. 504.

was *prima facie* a wrong, a trespass which could be justified only when done for some purpose allowed to form a sufficient justification by the law of nations."

Neutral ship within foreign jurisdiction.

But it is said, when the neutral merchant ship is within the limits of the territorial jurisdiction of a foreign State, the jurisdiction of the sovereign of the neutral is wholly excluded.*

In the first place, however, this is a rule by no means universally, or to its full extent, adopted; and next, were it so, it is insufficient to sustain the view in support of which it is brought forward. It is true that in all relations between the persons on board the neutral ship and the subjects of the foreign State, within the jurisdiction of which that vessel is for the time, the law of the foreign State is paramount. But it is asserted by M. Hautefeuille† as a general principle, and in that assertion the maritime jurisprudence of France undoubtedly supports him, that in every matter, civil or criminal, in which those on board the neutral vessel alone are concerned, the sovereign of the neutral still has the sole jurisdiction; the laws of the neutral nation are the only laws observed or enforced; a birth or a death happening

* Wheaton, Int. Law, 233.

† Droits des Nat. Neut. 2, pp. 5–46.

on board, the punishment of crimes, or the enforcement of regulations, such events are invariably held to be governed by the law of the neutral State; and this, in the instance of crimes committed by one of the crew or passengers of the neutral ship against another, prevails so completely, and in such a marked degree, that when several vessels of the same nation are together within the jurisdiction of a foreign power, and a crime is committed on board of one of them, whether ship of war or merchantman, the officer of highest rank in the service of the State, or if there be no ship of war, the consul, and in his absence, even the master of the merchantman, exercises an authority, limited, indeed, it may be, by the laws of his own country, but wholly exclusive of the jurisdiction of that power within whose territory he is said to be.

If this be so, surely in a matter in which the prerogative of sovereignty is so nearly touched, it is the more reasonable course to hold that the neutral ship of war remains thus independent of the foreign State, though wholly within the strictest limits of its territorial jurisdiction, by virtue of a quality inherent in the vessel itself, and not by the mere courtesy of nations, rather than to assume that the neutral merchant ship becomes

in all respects subject to the foreign jurisdiction from the moment of entering foreign waters, and to deduce, as a necessary consequence from that assumption, that ships cannot have territoriality predicated of them: and if, by way of crucial experiment, the case be put of a subject of the foreign State taking refuge on board a neutral ship in a foreign port, the simple answer is that by his coming on board, a relation between the ship and the shore is at once established; and that, therefore, this instance forms no exception and is not in point. While to the argument, founded on the principle of a very important decision * in the American courts, that all exemption from territorial jurisdiction is derived from the consent of the foreign sovereign, which consent in the case of ships of war is to be implied, it may be replied that such consent is required to be implied for the mere purpose of entering the territorial limits of the foreign state, and that to assume that such implied consent draws with it the implied condition that the consenting state shall have jurisdiction over the entering vessel if it be a merchant ship, but not if it be a man-of-war, is really to beg the whole question upon a very complicated hypothesis.

* Schooner Exchange *v.* McFadder, 7 Cranch, 117.

Neutral ship on high seas.

But for the sake of argument let it be granted that the jurisdiction of the foreign power over the neutral within its own territorial limits is complete for all purposes, what would this show but that the territorial quality of the neutral ship ceases in the presence, so to speak, of a more potent territoriality of the State, within the actual territorial limits of which it is stationed for the time? When, however, the neutral is on the high seas, where no sovereign has jurisdiction save that exercised by each over his own vessels, a familiar maxim would seem to be applicable, that, when the reason ceases, the rule ceases too, and the neutral resumes the territoriality which had been suspended: otherwise this anomaly among others would follow, that, a sovereign jurisdiction being essentially co-extensive with the territorial limits of the sovereignty, and no part of the ocean being within the jurisdiction or sovereignty of any, all vessels sail lawlessly upon the high seas, assuming territoriality only within three miles of land, and changing it with each new country visited; and that merchant ship's papers, and cruiser's commissions are alike equally superfluous and invalid.

From the above consideration it appears that the seizure, whether of goods or men, upon a neutral ship in the exercise of the belligerent's right of

search is in its inception a direct violation of neutral territory, allowable only where the sanction of continued usage has grafted it by way of exception upon the general principle pervading international law. The exception I admit has become a large one; so large, that as I have before observed, even Great Britain has at last, by the treaty of Paris, 1856, consented to waive it in favour of the protection of the flag extending to all it covers, enemy's goods as well as neutral; but this does but afford another reason for denying the existence of a further exception extending to the persons of enemy's subjects, until it be established as incontestably as that of seizing enemy's goods has been. And I may further observe on the authority of M. Hautefeuille, from whose most valuable work on the rights of neutral nations I freely confess myself to have derived much material, both for illustration and for argument upon this portion of the question, that every treaty* which adopts the principle of "free ship free goods," contains also a clause exempting passengers from being seized, unless soldiers or sailors ("gens de guerre,") actually in the enemy's service; this clause, that author goes on to say, does not occur under the head of contraband of war, but under that which

Treaties exempting passengers other than military, &c. from seizure.

* Droits des Nat. N. 2, 459, *n.* 2.

recognises ("consacre") the rights of the neutral flag. And its effect is clearly this,—not, as might be argued by one who applies to the interpretation of treaties the severe rules of strict legal formulæ, to show that, but for this clause, private persons might be seized on neutral ships,—but that, when that principle is adopted, the belligerent *will* be content merely to remove persons in the military or naval service of the enemy, whose presence, but for this, would render the whole ship liable to confiscation.

Despatches on board mail-packet.

I have now discussed at the risk, it may be, of prolixity, the character of the persons seized by the *San Jacinto* and of the vessel from which they were taken; and in so doing, have, from the nature of the subject, been led to ascertain what are those principles of international law, which afford the rule whereby we may arrive at a correct conclusion upon the merits of the matter in dispute. I have not thought it advisable to incumber these remarks with further comment upon the hypothetical case of there being on board this mail-packet despatches, properly so called, transmitted in the ordinary course of the postal service for delivery. The great inconvenience and injury to the interest of commerce, which would arise from the exercise of a right to visit and search such a vessel, to open

the mail bags and examine their contents on mere suspicion, and from the leaving it to the discretion of the boarding officer to say what do and what do not amount to "official communications of official persons on the affairs of the Government," * are manifest; yet far more inconvenient and injurious would be the only alternative to that discretion, were the exercise of such a right permitted, and the vessel had in every case to be taken to the nearest port for adjudication. But I have before sufficiently protested against this question being treated as being in any sense one of despatches, and to those who desire to carry further their investigation of the privilege of mail-packets, I can do no better service, than refer them to the pages of M. Hautefeuille's work for an elaborate and exhaustive examination of the subject.†

Voyage between neutral ports.

The sole remaining point for consideration is the effect of the particular nature of the voyage in this case upon the liability of the persons seized to be so treated. I will here assume the strongest case possible under the circumstances to be conclusively made out against Messrs. Mason and Slidell; I will suppose it proved that they were agents employed by the Confederate States on a

* The Caroline, 6 Rob. 465.

† Droits des Nat. N. 2, 462, *et seq.*

highly important public mission; but destitute of any special character such as should invest them with ambassadorial privileges of any kind. I will further admit, for the sake of strengthening the case against them, that the decisions with reference to despatches govern this so far as making it immaterial whether it be the port from which the vessel starts or that of its destination that is hostile; but after all this I can find no case, no dictum even, where the carrying either of despatches or of soldiers between two neutral ports has been considered an act of contraband; (and, as I have before shown, it must be that, or it is nothing, to support the exercise of the right of search) or in any way construable into a deviation from the strict impartiality which a neutral is bound to observe towards both belligerents. Sir W. Scott, in one of his celebrated judgments,* referring to the case of the *Trende Sostre*, in which "the same fact (*i.e.* that of the legality of conveying despatches between the belligerent mother-country and a colony) came incidentally before this court," says, "the question of law was avoided, as was that of contraband, by the circumstance that before the seizure, the Cape of Good Hope, to which port the vessel was going, had ceased to

* Atalanta, Rob. 6, 440.

be a colony of the enemy, and had become an English settlement."

That the question of contraband was thereby avoided is the result of one of the first elements of the law relating to that subject, namely, that a contraband article must be taken *in delicto* on a voyage *to an enemy's* port:* and the statement that "the question of law" was thereby avoided, shows this at all events, that the learned judge at that time still continued to consider the *terminus ad quem* a material fact in such a question.

Ordinary means of intercourse.

Again, in considering the effect which the nature of the voyage and of the vessel may have, when regarded in conjunction with the character of the persons seized, upon the right to seize them, it is important to observe that Sir W. Scott, in the case of the *Atalanta*, expressly rests his decision upon the mode of communication then prevailing. "How," he asks, "is the intercourse between the colony and the mother country kept up in time of peace? By ships of war or packets in the service of the State." And from that answer he proceeds to deduce the importance of neutrals abstaining from relieving belligerents from the burden and risk of maintaining this intercourse in time of war. Clearly, principles based on such a state of facts

* Wheaton, Int. Law, 568.

can have no binding force in a case where the neutral has all along been engaged, in time of peace as well as of war, in maintaining that intercourse, as part of the ordinary postal service, with which it had charged itself in the general interests of society and commerce.

Now it may well be that all despatches passing between a mother country and her colonies should be subject to confiscation, and should even render the conveying vessel liable to that penalty, and in all the cases where despatches have been held to be contraband, they have been communications of that nature; but as is said in the often cited case of the *Caroline,* "Another distinction arises from the character of the person who is employed in the correspondence. He is not an executive officer of the Government acting simply in the conduct of its own affairs within its own territory, but an ambassador resident in a neutral State, for the purpose of supporting an amicable relation with it."

It seems strange that these persons are to be considered liable to seizure by virtue of their sustaining the novel part of "an embodiment of despatches," while, had their disembodied originals been sent to them to undergo the preliminary process of assimilation, these would have been secure upon their passage.

Essential that one port be hostile when despatches seized.

It may be said that, by admitting the cases of despatches to apply by analogy, I admit what is conclusive against me; and an argument, which I have met with in a recent publication upon this subject, may be used, to the effect that, inasmuch as it has been determined that the fact of either one of the termini of the voyage being neutral is immaterial, it follows that the fact of both being so makes as little a distinction. "If then," it has been argued, "neither the commencement nor the destined end of a voyage can separately protect against detention, it would be hard to show that the two combined have that force." I must confess that I cannot appreciate the difficulty of showing it. In other language, that process of reasoning amounts to this: that because either one of two causes taken separately does not produce a certain result, therefore both taken together cannot. It may be true that they do not, but the logical sequence is at least not evident.

In support, however, of the view that despatches conveyed in a neutral ship are not protected when both ports are neutral, the case of the *Rapid** has been cited, and the argument to which I have above alluded is clenched by a sentence from the judgment of Lord Stowell in that case, where,

* Edwards, Rep. 228.

speaking of the caution with which the master should receive public despatches, after remarking on the case of the letters being brought to him in a hostile port, addressed to residents in a hostile country, he says: "On the other hand, when the commencement of the voyage is in a neutral country, and it is to terminate at a neutral port, or, as in this instance, at a port to which, though not neutral, an open trade is allowed, in such a case there is less to excite his vigilance, and therefore it may be proper to make some allowance for any imposition which may be practised on him." Now the despatches in that case were "papers from a person who seemed to be invested with something of a public character," an agent of a belligerent resident in a neutral country, and were sent thence by him to a belligerent minister in the belligerent country, under cover of a communication to a commercial house at the open hostile port: and it further appears from the report to have been a matter of doubt in the first instance whether the alleged destination was not, in fact, a colourable one, to conceal the design of making for a hostile port which was blockaded at the time. And because the Court thus considered that although the ship was not forfeited, still the captain had himself to thank for the inconvenience of de-

tention, and the expense of legal proceedings, the inference is to be drawn that the despatches in the case put might be lawfully seized and retained by the captors! I cannot think that so important a principle as that contended for can be considered to be established by so purely incidental a remark as that in the text, and, at all events, I am entitled to assume that the remark was made with reference to the circumstances of the particular case. It is not upon such dicta that the great system of international law has been erected, nor by such will the general principles on which it rests be shaken.

But indeed all the cases of despatches have been cases of communications passing between the belligerent Government and its officer, not from a belligerent to a neutral State, as this case, assuming it to be one of mere despatches, undoubtedly was. "The true criterion* will be, Is it on the public business of the State and passing between public persons for the public service?" And when, as here, all these conditions are not fulfilled, the rule of those cases has no application.

I have now arrived at a point where it becomes necessary to notice the case of the *Hendric. and* The *Hendric and Alida.*

* The Caroline, 6 Rob. 465.

Alida,* which has been recently made familiar to the public through the columns of the daily journals. It was a case of a Dutch ship at the time of our first American war, 1777, sailing from Amsterdam to St. Eustatia, a Dutch settlement, laden with powder and guns, and five military officers, going avowedly to serve in the provincial army and holding commissions from a rebel commissioner. It was argued in that case that the destination of the ship was merely colourable, and that she was really destined for New England, a hostile quarter. And upon that point, Sir G. Hay, in his judgment, says, "If it was clear that she were going to New England, touching at St. Eustatia, that would never do. All ships trading there are confiscable." It must be inferred that New England was then blockaded; but if it were not so, the remark is irresistible that a judge who lays down a rule so eminently opposed to the interest of neutrals as that contained in the last sentence, would not have given them the benefit of the doubt upon the other point, if any had existed in his mind. The judgment then continues; "It would be too high for any such court as this to assert that the Dutch may not carry in their own ships, to their own colonies and settlements,

* Marriott's Adm. Decisions, 139.

everything they please, whether arms or ammunition, or any other species of merchandise, provided they did it with the permission of their own laws, and if they act contrary to them I am no judge of the laws of Holland." It appears from other sources that the persons of the officers were not detained as prisoners of war.

I have abstained hitherto from citing this, lest I might appear, by relying overmuch upon it, to entertain or sanction the thought that this important question could be set at rest for ever by an appeal to the authority of one isolated judgment of a British tribunal, pronounced nearly a century ago, however parallel the circumstances and however unimpeachable the decision. On the other hand, I am equally far from wishing to undervalue the bearing of that case, as showing that so long ago as the year 1777, the mere fact of its not being clear that the voyage was not to a neutral port, was, in the opinion of the judge who then presided in the Court of Admiralty, a sufficient ground for him to hold, against the interests of his own—the belligerent—country, that the vessel conveying arms and ammunition, and persons acknowledged to hold commissions from the enemy, —and that enemy a rebel province,—was not, in doing so, guilty of a violation of the duties of its

neutrality. The case, I must observe, is not very satisfactorily reported, and far more room is accorded to the somewhat declamatory arguments of counsel, than to the judgment of the Court. Be that as it may, I am content, having, as I hope, sufficiently in the preceding pages established without its aid the propriety of the principle there recognized, to use it for the purpose of justifying the arguments which I have adduced, and for which I could not devise a more appropriate conclusion.

If I shall have succeeded in assuring my readers that the universal feeling of alarm and indignation which the "affair of the *Trent*" has excited, has not been unfounded or exaggerated, my purpose will have been accomplished. The importance of the case is no less than this; that this country cannot pass it over, or rest satisfied with anything short of the most ample redress, without forming a precedent fatal to the supremacy of that system of law by which nations have bound themselves, fatal also to the character of this country, as the protector of all those who are entitled by law to the asylum of her flag.

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